

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

BANC DE BINARY LTD., et al.

Defendants.

Case No. 2:13-cv-00992-MMD-VCF

ORDER

(Defs.' Objections to Magistrate Judge's
Jan. 15, 2015 Discovery Order – dkt. no.
102)

(Defs.' Objections to Magistrate Judge's
Feb. 11, 2015 Discovery Order – dkt. no.
108)

(Defs.' Emergency Motion for a Hearing
and Expedited Ruling – dkt. no. 115)

I. SUMMARY

Defendants Banc de Binary Ltd., et al., object to, and seek reconsideration of, two discovery orders (dkt. nos. 101, 103) issued by Magistrate Judge Cam Ferenbach. (Dkt. nos. 102, 108.) The Court has reviewed Plaintiff's opposition briefs (dkt. nos. 104, 109). Because the Court finds that the Magistrate Judge's decisions are not clearly erroneous or contrary to law, Defendants' objections are overruled, and their requests for reconsideration are denied. Furthermore, Defendants' Emergency Motion for a Hearing and Expedited Ruling (dkt. no. 115) is denied as moot.

II. BACKGROUND

The discovery disputes at issue arise from Plaintiff's civil enforcement action, which alleges that Defendants violated various provisions of the Commodity Exchange Act and its applicable regulations by trading certain financial instruments. (See dkt. no.

52 ¶¶ 1-10.) On January 15, 2015, the Magistrate Judge issued a discovery order (“January Order”) denying Defendants’ Motion for Partial Stay of Discovery pending the resolution of a dispositive motion. (Dkt. no. 101.) Defendants objected on February 2, 2015. (Dkt. no. 102.) Shortly thereafter, on February 11, 2015, the Magistrate Judge entered a second discovery order (“February Order”) that denied Defendants’ Motion for Protective Order and granted Plaintiff’s Motion to Compel. (Dkt. no. 103.) Defendants filed their objections on March 2, 2015. (Dkt. no. 108.)

III. LEGAL STANDARD

Magistrate judges are authorized to resolve pretrial matters subject to district court review under a “clearly erroneous or contrary to law” standard. 28 U.S.C. § 636(b)(1)(A); see *also* Fed. R. Civ. P. 72(a); LR IB 3-1(a) (“A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3, where it has been shown that the magistrate judge’s ruling is clearly erroneous or contrary to law.”). A magistrate judge’s “finding is clearly erroneous when although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (alteration, citation, and internal quotation marks omitted). Because a magistrate judge’s pretrial order issued under 28 U.S.C. § 636(b)(1)(A) is not subject to *de novo* review, “[t]he reviewing court may not simply substitute its judgment for that of the deciding court.” *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

IV. JANUARY ORDER ON DEFENDANTS’ MOTION TO STAY DISCOVERY

The January Order denied Defendants’ Motion for Partial Stay of Discovery relating to Defendants’ alleged contacts with United States-based customers before October 2012. (Dkt. no. 101 at 1-4; see dkt. no. 76.) Defendants sought the partial stay in light of their pending Motion for Partial Summary Judgment (“MPSJ”), which argues that Plaintiff lacked jurisdiction to regulate the financial instruments at issue in Plaintiff’s

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1 civil enforcement action before a change in the relevant law became effective in October
2 2012. (Dkt. no. 74 at 4.)

3 “Under the liberal discovery principles of the Federal Rules,” a party seeking to
4 limit discovery “carr[ies] a heavy burden of showing why discovery [should be] denied.”
5 *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975); see also *Tradebay, LLC*
6 *v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011). To determine whether Defendants
7 met this burden, the Magistrate Judge applied the following two-part test, which several
8 courts in this District have adopted: (1) “the pending motion must be potentially
9 dispositive of the entire case or at least dispositive of the issue on which discovery is
10 sought,” and (2) “the court must determine whether the pending potentially dispositive
11 motion can be decided without additional discovery.” (Dkt. no. 101 at 2 (quoting
12 *Tradebay*, 278 F.R.D. at 602) (internal quotation marks omitted).) The Magistrate Judge
13 concluded that Defendants could not satisfy the second prong of this two-part test
14 because the issue underlying the MPSJ — the scope of Plaintiff’s jurisdiction — turns on
15 open questions of fact, not law, and because Defendants failed to show that those
16 questions of fact could be decided without further discovery. (Dkt. no. 101 at 2-4.)

17 Defendants assert that the Magistrate Judge’s analysis was clearly erroneous and
18 contrary to law because it relies on the Magistrate Judge’s misreading of an earlier order
19 that denied Defendants’ Motion to Dismiss (“MTD Order”). (Dkt. no. 102 at 3-5.) Like the
20 MPSJ, the Motion to Dismiss had raised arguments regarding the scope of Plaintiff’s
21 jurisdiction. (See dkt. no. 44.) As the Magistrate Judge noted, the MTD Order denied
22 dismissal because of a factual dispute over whether Defendants’ financial instruments
23 could be classified as “options” as defined in the Commodity Exchange Act. (Dkt. no.
24 101 at 2-3.) The Court could not resolve such a factual dispute at the pleading stage
25 without reaching beyond the Complaint. (See dkt. no. 44 at 6.) The Magistrate Judge
26 reasoned that the same questions of fact that foreclosed dismissal would affect
27 Defendants’ MPSJ. (Dkt. no. 101 at 2-4.) In light of this open question of fact, and given
28 the parties’ dispute over the extent of discovery required to address the MPSJ, the

1 Magistrate Judge concluded that Defendants had failed to meet their burden of showing
2 that discovery should be stayed. (*Id.* at 3-4.)

3 Defendants argue that the Magistrate Judge misread the MTD Order in stating
4 that the Court “has already determined that discovery is required to adjudicate the issues
5 underlying” the MPSJ. (Dkt. no. 102 at 3-4 (quoting dkt. no. 101 at 2) (internal quotation
6 marks omitted).) The Court disagrees. Although Defendants are correct that the MTD
7 Order did not address outstanding discovery needs in the MPSJ context, the Magistrate
8 Judge referenced the MTD Order merely to illustrate that the dispute prompting
9 Defendants’ request to stay discovery involves an open question of fact, not of law. (See
10 dkt. no. 101 at 2-3.) This reasoning is not clearly erroneous or contrary to law.

11 Defendants further contend that the Magistrate Judge acted contrary to law by
12 failing to take a “preliminary peek” at the merits of the MPSJ before concluding that
13 additional discovery is required to resolve it. (Dkt. no. 102 at 5-7.) This argument is also
14 unavailing. The Magistrate Judge explained that the potentially dispositive issue in the
15 MPSJ was the same issue addressed in the MTD Order — whether, before October
16 2012, the Commodity Exchange Act covered Defendants’ trading of financial
17 instruments. (Dkt. no. 101 at 3-4.) Because that issue involved an open question of fact,
18 the Magistrate Judge concluded that staying discovery would be inappropriate. (*Id.*)
19 Furthermore, the Magistrate Judge reasoned that even if this “preliminary peek” had
20 convinced him that Defendants would prevail on their MPSJ, a stay of discovery would
21 still prejudice Plaintiff by foreclosing Plaintiff’s ability to oppose the motion. (*Id.* at 4.) The
22 Court thus finds that the Magistrate Judge’s decision was neither clearly erroneous nor
23 contrary to law.

24 Accordingly, the Court will overrule Defendants’ objections to the January Order
25 and deny their request for reconsideration.

26 **V. FEBRUARY ORDER**

27 Defendants raise similar objections to the Magistrate Judge’s February Order,
28 which denied Defendants’ Motion for Protective Order and granted Plaintiff’s Motion to

1 Compel. (Dkt. no. 103.) The Court will address objections regarding each Motion in turn.

2 **A. Motion for Protective Order**

3 Defendants contend that the Magistrate Judge clearly erred in denying
4 Defendants' Motion for Protective Order, which sought to quash the deposition of Yoram
5 Menachem and to limit the scope of discovery in light of the pending MPSJ. (Dkt. no. 103
6 at 2-4; see dkt. no. 77.) With regard to the scope of discovery, Defendants argue that the
7 Magistrate Judge misconstrued the basis for their request by reasoning that "[a] party
8 cannot resist discovery by asserting that a claim will fail." (Dkt. no. 103 at 3; see dkt. no.
9 108 at 8-9.) Defendants argue that they requested to limit the scope of discovery in light
10 of the MPSJ, a detail the Magistrate Judge allegedly ignored. (Dkt. no. 108 at 9.) The
11 Court finds that the Magistrate Judge did not commit clear error or act contrary to law in
12 refusing to limit the scope of discovery. First, the February Order did, in fact, reference
13 the MPSJ. (See dkt. no. 103 at 2-3.) Moreover, as noted above, the Court disagrees with
14 Defendants that the Magistrate Judge erred in refusing to stay discovery pending the
15 resolution of their MPSJ. (See *supra* Part IV.)

16 Defendants further argue that the Magistrate Judge made two clear errors in
17 refusing to quash the Menachem deposition. First, Defendants contend that the
18 Magistrate Judge failed to consider supporting affidavits before concluding that
19 Defendants had failed to show that the deposition would cause Menachem — the CEO
20 of Defendant E.T. Binary Options Ltd. ("ETBO") — to experience "annoyance,
21 embarrassment, oppression, or undue burden or expense." (Dkt. no. 103 at 4); see Fed.
22 R. Civ. P. 26(c)(1). By ignoring those affidavits, Defendants argue, the Magistrate Judge
23 failed to balance the deponent's needs with Plaintiff's interest in accessing information.
24 (Dkt. no. 108 at 7 (citing *Serrano v. Cintas Corp.*, 699 F.3d 884, 902 (6th Cir. 2012)).)
25 Second, Defendants contend that in reasoning that Menachem could produce
26 discoverable information, the Magistrate Judge improperly relied on an out-of-context
27 statement made during the deposition of Defendant Oren Laurent. (*Id.* at 7-8.) The Court

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1 finds that neither of these alleged deficiencies demonstrates that the Magistrate Judge's
2 decision was contrary to law or clearly erroneous.

3 A party seeking a protective order has the burden to "show good cause [for the
4 order] by demonstrating harm or prejudice that will result from the discovery." *Rivera v.*
5 *NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (internal quotation marks omitted).
6 Here, Defendants are correct that in concluding that Defendants failed to meet this
7 burden, the Magistrate Judge did not cite to two affidavits that Defendants offered in
8 support of their Motion for Protective Order. (See dkt. no. 103 at 3-4.) This omission,
9 however, does not render the Magistrate Judge's conclusion clearly erroneous or
10 contrary to law. Menachem's own affidavit states that he "believe[s] that [Plaintiff] has
11 noticed [his] deposition for the sole purpose of harassing and annoying [him]." (Dkt. no.
12 77-2 ¶ 2.) Menachem further writes that, "[t]o the best of [his] knowledge, [he has] no
13 personal knowledge of the events giving rise to CFTC's action." (*Id.* ¶ 6.) Defendants'
14 second affidavit — authored by Defendants' counsel — similarly asserts that Menachem
15 cannot provide "unique, non-repetitive information." (Dkt. no. 77-3 ¶¶ 5, 7.) But the gist of
16 the Magistrate Judge's reasoning is that Defendants failed to meet their burden because
17 they relied too heavily on Menachem's status as ETBO's CEO in seeking to quash his
18 deposition. (See dkt. no. 103 at 4.) These affidavits do not undermine that rationale.
19 Except for these conclusory statements, the affidavits do not demonstrate that
20 Menachem's deposition will cause him harm or prejudice. Thus, even though the
21 February Order does not cite to these affidavits, the Court is not persuaded that the
22 Magistrate Judge's decision was clearly erroneous or contrary to law.

23 Nor does the Court find that the Magistrate Judge erred in referring to Laurent's
24 deposition. In a footnote, the Magistrate Judge explained that he found unavailing
25 Defendants' argument that Menachem lacked discoverable information because he
26 became CEO after Plaintiff had initiated this action. (Dkt. no. 103 at 4 n.3.) The
27 Magistrate Judge referred to Laurent's deposition — which suggested that Menachem
28 had knowledge of Defendants' day-to-day activities — as an example to bolster this

1 point. (See *id.*) Rather than deny Plaintiff the opportunity to depose Menachem, the
2 Magistrate Judge reasoned that Menachem could explain, during his deposition, any
3 lack of knowledge caused by his late start date. (*Id.*) This reasoning supports the
4 Magistrate Judge's overall conclusion that Defendants failed to demonstrate any harm or
5 prejudice that would result from Menachem's deposition. See *Rivera*, 364 F.3d at 1063.
6 As noted above, the Court is not convinced that the Magistrate Judge clearly erred or
7 acted contrary to law in concluding that Menachem's status as ETBO's CEO does not,
8 without more, warrant the protective order. Accordingly, the Court overrules Defendants'
9 objections and declines to reconsider the Magistrate Judge's denial of Defendants'
10 Motion for Protective Order.

11 **B. Motion to Compel**

12 Defendants also object to the Magistrate Judge's decision to grant Plaintiff's
13 Motion to Compel.¹ They argue that the decision was clearly erroneous and contrary to
14 law because the Magistrate Judge improperly shifted the burden of persuasion to
15 Defendants after determining that Plaintiff had failed to satisfy its threshold burden. (Dkt.
16 no. 108 at 9-11.) Defendants also contend that the Magistrate Judge erred by allegedly
17 creating Plaintiff's legal arguments for them. (*Id.* at 10-11.) The Court disagrees.

18 First, rather than concluding that the Motion to Compel entirely fails to identify
19 relevant and discoverable information (as Defendants contend), the Magistrate Judge
20 merely admonished Plaintiff for filing an unnecessarily lengthy and repetitive motion.
21 (See dkt. no. 103 at 7.) The Magistrate Judge noted instances in the Motion to Compel
22 that, alone, failed to indicate whether the information sought was relevant or
23 discoverable. For instance, the Magistrate Judge was not persuaded by requests for
24 information that would expand the scope of party-controlled discovery, including

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26 ¹Plaintiff submitted an errata to its Motion to Compel, seeking to modify the relief
27 requested in its Motion. (Dkt. no. 110.) The Court does not address whether Plaintiff's
28 request is appropriately raised in an errata. Because Plaintiff's errata relates to the
Magistrate Judge's February Order, Plaintiff's request should be raised with the
Magistrate Judge.

1 discovery associated with a pending Order to Show Cause. (*Id.* at 7 & n.5.) Additionally,
2 the Magistrate Judge rejected Plaintiff's attempt to rely on discovery orders issued in a
3 parallel action that the Securities and Exchange Commission brought against
4 Defendants. (*Id.* at 7 & n.6.) Notwithstanding these deficiencies, the Magistrate Judge
5 concluded that the Motion to Compel seeks discoverable information that is relevant to
6 Plaintiff's allegations that Defendants acted as a common enterprise in unlawfully
7 soliciting customers in the United States. (*Id.* at 8-9.) In light of this threshold showing,
8 the Magistrate Judge further reasoned that Defendants had failed to meet their burden in
9 resisting discovery. (*Id.* at 7-8); see *Blankenship*, 519 F.2d at 429. These conclusions
10 are not clearly erroneous or contrary to law. See Fed. R. Civ. P. 26(b)(1) ("For good
11 cause, the court may order discovery of any matter relevant to the subject matter
12 involved in the action.")

13 Defendants' second objection — that the Magistrate Judge crafted Plaintiff's legal
14 arguments for them — also falls short. (See *dk.* no. 108 at 10-11.) Defendants place too
15 much weight on language that the Magistrate Judge cited in reprimanding Plaintiff for
16 filing an overly lengthy motion. (See *dk.* no. 103 at 8.) The Magistrate Judge noted that
17 he "reviewed each of [Plaintiff's] requests" before concluding that they warrant granting
18 the Motion to Compel. (*Id.*) Indeed, despite the length of the Motion to Compel, the
19 Magistrate Judge identified eight discrete types of information that Plaintiff seeks. (*Id.* at
20 9.) Nothing in the February Order suggests that the Magistrate Judge committed clear
21 error or acted contrary to law in identifying what information Plaintiff seeks, and why. The
22 Court therefore overrules Defendants' objections and declines to reconsider the
23 Magistrate Judge's ruling on Plaintiff's Motion to Compel.

24 VI. EMERGENCY MOTION

25 Because the Court has resolved Defendants' objections to the January and
26 February Orders, the Court denies Defendants' Emergency Motion for a Hearing and
27 Expedited Ruling (*dk.* no. 115) as moot.

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Moreover, the Court notes that Defendants waited until the final deadline to file their objections to the January and February Orders. (See dkt. no. 101 (issued January 15, 2015); dkt. no. 102 (filed February 2, 2015); dkt. no. 103 (issued February 11, 2015); dkt. no. 108 (filed March 2, 2015).) Defendants sought review of their objections on an emergency basis more than two weeks after their objections were fully briefed. (See dkt. no. 115 (filed April 3, 2015); dkt. no. 109 (Plaintiff's response to Defendants' latest objections, filed March 19, 2015).) They waited nearly one month after they were required to file responses to document requests and interrogatories — one of the reasons for which Defendants requested expedited review — to seek emergency relief. (See dkt. no. 115 at 5; dkt. no. 116 at 2 (correcting the Emergency Motion to clarify that Defendants' responses were due by March 6, 2015, rather than by May 6, 2015).) Defendants thus appear to have created their own emergency through delay.²


VII. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Objections.

It is ordered that Defendants' Objections to the Magistrate Judge's Discovery Orders (dkt. nos. 102, 108) are overruled and denied.

It is further ordered that Defendants' Emergency Motion (dkt. no. 115) is denied as moot.

Dated this 22nd day of April 2015.


 MIRANDA M. DU
 UNITED STATES DISTRICT JUDGE

²Although Defendants engaged in apparent delay, Defendants then expected an immediate response from the Court. This is evidenced by Defendants' letter to the Court inquiring about the status of their Emergency Motion shortly after it was filed. (Dkt. no. 120.)